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No. 82-749

In the Supreme Court of the United States

OCTOBER TERM, 1982

PETER F. K. BARABAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ROBERT E. LINDSAY
LIBERO MARINELLI, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in this prosecution for income tax evasion, the prosecutor's comments in closing argument constituted an indirect reference to petitioner's failure to testify.

2. Whether the government's investigation of leads to nontaxable sources of income was adequate under the net worth method of proving tax evasion.

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OPINIONS BELOW

Neither the district court nor the court of appeals issued a written opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1981 (Pet. App. 1a). A petition for rehearing was denied on August 30, 1982 (Pet. App. 2a-3a). The petition for a writ of certiorari was filed on October 29, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of willfully attempting to evade

his personal income taxes for the years 1975 through 1977, in violation of 26 U.S.C. 7201. The district court sentenced him to consecutive terms of three years' imprisonment on two of the three counts on which he was convicted and five years' probation on the remaining count, to commence following service of the sentence of imprisonment. The court of appeals affirmed (Pet. App. 1a).

The government's proof at trial established that petitioner was an attorney who engaged in private practice in Miami and Palm Beach, Florida. Petitioner's specialty was criminal law and a large part of his practice involved defending persons accused of narcotics offenses (Tr. 461-469, 598-599, 601, 607).[1] The government employed the net worth plus non-deductible expenditures method of proof to establish that petitioner had underreported his gross income and, as a consequence, his tax liabilities for 1975 through 1977. The net worth method of proof was necessary because petitioner's clients paid their fees to him in cash, and not all of the cash payments were deposited in his bank accounts.

The government proved that the increases in petitioner's net worth plus his non-deductible expenditures exceeded his reported gross income by $111,898 for 1975;[2] by $934,594 for 1976;[3] and by $859,202

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[1] "Tr." refers to the transcript of the proceedings in the district court.

[2] G. Exs. 1, 28-31, 149-150, 159-160, 171, 175-176, 186; Tr. 181, 698-701, 734-735. "G. Ex." refers to the government's trial exhibits admitted into evidence in the district court.

[3] G. Exs. 26, 28-31, 34, 37-38, 41-42, 71, 84, 88-92, 99-100, 120, 133, 138, 145-147, 167, 169-170, 179, 185-186; Tr. 133, 174, 181, 217, 275-277, 284, 305, 384, 402, 404, 454, 478, 485-488, 490-507, 510-514, 516, 522-524, 568-570, 575, 601-605, 622-623, 632-633, 698, 726, 728, 735, 780-781, 785, 812-815.

for 1977.[4] The additional amounts of income tax due from petitioner as a result of his underreporting were $45,921 for 1975, $474,540 for 1976, and $429,856 for 1977, or $950,317 for the three years (G. Ex. 186; Tr. 918-923, 931-932).[5]

To establish the starting point required for use of the net worth method, which was December 31, 1974, the government presented evidence to show that it had gathered information throwing light on petitioner's assets and liabilities during the three years prior to those in issue. That evidence established that the government had examined public records in the Florida counties in which petitioner resided, worked, or was known to own property, and the records of all banks with which petitioner was known or thought to have done business. The government also showed that it had interviewed petitioner's father and other relatives to determine whether he had received gifts, inheritances, or other forms of net worth increase from non-taxable sources. G. Exs. 121-126, 134, 137, 139-144, 149-150, 157-160, 186; Tr. 817-830. The

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[4] G. Exs. 3, 12, 19-20, 23-24, 27-30, 35-36, 40-43, 47-48, 57-59, 64, 71, 86-87, 97, 133, 138, 154, 156, 162, 175-176, 186; Tr. 27, 35-36, 69-70, 84-86, 128, 165, 181, 195, 200, 217, 268, 276, 284, 309, 354-355, 385, 389, 402, 416, 456-457, 527, 535-540, 575, 582, 704-705, 727, 735.

[5] The evidence at trial also established that a large number of nondeductible expenditures made by petitioner during the prosecution years were made in cash. Frequently, petitioner would hand the seller of an item or the provider of some service a shopping bag containing cash in amounts that ranged as high as $100,000. G. Exs. 26, 28-31, 37-38, 41, 71, 78, 84, 88-92, 133-138, 145-147, 167, 169-170, 185-186; Tr. 133, 174, 217, 305, 376, 384, 478, 485-488, 491, 494-507, 510-514, 568-570, 575, 601-605, 622-623, 632-633, 698, 726, 735, 738, 780-781, 785, 812, 813.

government's proof established that on December 31, 1974, petitioner's liabilities exceeded his assets by $43,776. G. Exs. 46, 52, 112-116, 121-126, 139-150, 186; Tr. 303-304, 368-370, 476-487, 721-725.

The government's evidence further established that petitioner's tax returns were prepared by his accountant, Alan Levi. Levi treated all deposits in petitioner's bank accounts as income. Petitioner's secretary, employed at his Miami office, testified that she deposited all fees received at the Miami office in his bank accounts. She recalled on one occasion assisting him in counting $40,000 in cash received as a fee from a client. Levi remembered on another occasion counting at petitioner's request $100,000 in cash received as a fee. The government's evidence indicated that when petitioner made a $43,000 payment on a bank loan in 1976, he paid in cash taken from a satchel containing additional cash. At the time, he said that the money had been received as a fee. The government's evidence established that petitioner had admitted to Levi that he had failed to deposit $50,000 in legal fees for 1977. That admission prompted Levi to include the $50,000 in the gross income reported on petitioner's 1977 tax return (Tr. 601, 613, 657-676, 679-682, 689-691, 790, 807).

The government's evidence disclosed that when petitioner showed his $350,000 Palm Beach residence to Levi, the latter realized that petitioner was receiving large amounts of cash that were neither deposited in his bank accounts nor reported on his tax returns. According to the government's evidence, petitioner explained to Levi that the cash was derived from a $1.2 million interest-free uncollateralized loan. For his own protection, Levi requested and obtained from petitioner a letter confirming that petitioner had

obtained such a loan. No written record of the loan, other than letters and statements originating from petitioner, was uncovered. G. Ex. 180; Tr. 340, 694-697, 803, 854-855, 873-876.

Following denial of petitioner's motion for a judgment of acquittal, petitioner rested without presenting any evidence. During his summation, the government's attorney made the following comments (Pet. 3-5):

> I don't know what additional questions you might have to me [sic]. I have tried to answer some of them or all of them that have occurred to me, and I don't know what questions you might have for Mr. Culverhouse [petitioner's trial attorney].
>
> But I have a few that I think you might want to ask, and I think that he should answer.
>
> First: Is there any dispute about the amounts of money that Peter Baraban spent and the increases in his net worth for 1975, 1976 and 1977?
>
> Second: Is there any real dispute about Mr. Baraban's opening net worth as of December 31, 1974?
>
> If there is no question about that, or even if there is, I would imagine that you would ask Mr. Culverhouse what conceivable purpose is there in this record consistent with any reasonable explanation of Mr. Baraban's innocence, except to conceal the source of money.
>
> What conceivable purpose was there for funneling the money to 950 South Miami Avenue Associates through Am-Vest [petitioner's wholly owned corporation], a corporation not even chartered in Florida.

What explanation is there in the record? Is Mr. Culverhouse going to ask you to believe that Peter Baraban really had a 1.2 million dollar loan?

What proof is there in this record of that loan, except Peter Baraban's self-serving statements that were made to Mr. Levi and the inclusion on the financial statement that was given to Mr. Landingham of 1.2 million as a liability, a financial statement which nevertheless reflects a positive net worth of $858,000.

What reasonable explanation consistent with Mr. Baraban's innocence, based on the facts and evidence in this case, can Mr. Culverhouse give you for Mr. Baraban's failure to deposit all his fees in bank accounts?

If all of the moneys that Mr. Baraban expended in 1975, 1976 and 1977, and particularly the so-called 1.2 million dollar loan, if these were loans or from nontaxable sources, why were they not put in bank accounts, if not to conceal sums of money that Mr. Baraban was receiving?

Does Mr. Culverhouse question it at all that 550 South Ocean Boulevard [the $350,000 Palm Beach house] was really Mr. Baraban's house, that he had bought, renovated and landscaped with his own money, with the intention of living there?

And finally, is not the only reasonable inference to be drawn from the concealing of these moneys, that of a guilty mind? We submit that the evidence in this case shows that Mr. Baraban evaded his taxes, attempted to evade his taxes for the years 1975, 1976 and 1977.

And that the evidence compels that conclusion beyond a reasonable doubt.

ARGUMENT

1. Petitioner first contends (Pet. 6-9) that during closing argument the prosecutor improperly commented on his failure to testify. He asserts that the question presented by this case is the same as that pending before this Court in *United States* v. *Hasting*, No. 81-1463 (argued Dec. 7, 1982); that the decision in *Hasting* will control the result here; and that this case should be either remanded to the court of appeals for clarification of the basis upon which the court affirmed petitioner's conviction or held pending the decision in *Hasting*.

There is, however, no reason to hold this case pending a decision in *Hasting*. In *Hasting*, the court of appeals concluded that the prosecutor's comments constituted an indirect comment on the defendants' failure to testify, and it refused to apply the harmless error doctrine. The sole question before this Court in *Hasting*—unquestionably absent in this case—is whether, assuming arguendo that the prosecutor's remarks did constitute prohibited indirect comment on the defendant's failure to testify, the court of appeals was free to refuse to apply the harmless error doctrine. Here, as we shall show, the prosecutor's comments cannot be construed as a reference to the defendant's failure to testify.[6] Hence, this Court's

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[6] When a defendant elects not to testify, it is error for the prosecutor to comment, either directly or indirectly, on the failure to testify. E.g., *Fontaine* v. *California*, 390 U.S. 593, 594-596 (1968); *Anderson* v. *Nelson*, 390 U.S. 523, 524 (1968); *Chapman* v. *California*, 386 U.S. 18, 20, 25 (1967); *Griffin* v. *California*, 380 U.S. 609, 615 (1965); see *United States* v. *Rodriguez*, 627 F.2d 110, 112 (7th Cir. 1980); *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976); *United States* v. *Flannery*, 451 F.2d 880, 881-882 (1st Cir. 1971).

decision in *Hasting* will have no bearing upon the question presented in the petition.[7]

a. Where, as here, there is no direct comment on the failure to testify, the test employed by the courts of appeals for determining whether a prosecutor's remarks constitute an indirect comment on an election not to testify is " 'whether or not the statement was manifestly intended or was of such a character that a jury would naturally or necessarily take it to be a comment on the failure of the accused to testify.' " *United States* v. *Sorzano*, 602 F.2d 1201, 1202 (5th Cir. 1979) (citation omitted). See also *United States* v. *Sanders*, 547 F.2d 1037, 1042 (8th Cir. 1976); *United States* v. *Bates*, 512 F.2d 56, 58 (5th Cir. 1975). In applying the test, it is necessary to examine the entire argument and all of the evidence presented to determine the context of the remarks and thus their intended meaning.[8] The proscription against indirect reference does not bar the prosecutor from reviewing the evidence and stating the inferences that he believes can properly be drawn from it,[9] from

[7] The principal argument advanced by the respondents in *Hasting* in support of the decision of the court of appeals rested not on any claim that the court of appeals was obliged to reverse the convictions even if the error was harmless, but rather on the assertion that such action was within the scope of its discretionary supervisory powers. While we believe, and have contended in *Hasting*, that no such power exists, a holding that it does would not avail petitioner since the court of appeals in this case did not elect to reverse his conviction.

[8] *United States* v. *Savarese*, 649 F.2d 83, 87 (1st Cir. 1981); *United States* v. *Renfro*, 600 F.2d 55, 57 (6th Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978).

[9] E.g., *United States* v. *Savarese*, *supra*, 649 F.2d at 87; *United States* v. *Magana-Arevalo*, 639 F.2d 226, 229 (5th

using hypothetical questions in suggesting the inferences to be drawn from the evidence (*United States* v. *Sorzano*, *supra*, 602 F.2d at 1202), from challenging the defense attorney to suggest in his closing argument equally logical inferences to be drawn from the evidence asserted to indicate innocence (*United States* v. *Passaro*, 624 F.2d 938, 944-945 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *United States* v. *Austin*, 585 F.2d 1271, 1279 (5th Cir. 1978)), or from stating that the government's case is undisputed where it is possible to contradict the government's case with evidence other than the defendant's testimony (*United States* v. *Sorzano*, *supra*, 602 F.2d at 1202). Indeed, the rule against indirect references does not bar a comment to the effect that the government's case stands unrebutted where the defendant presents no evidence. *United States* v. *Downs*, 615 F.2d 677, 679 (5th Cir. 1980); *United States* v. *Passaro*, *supra*, 624 F.2d at 944; see also *United States* v. *Sanders*, *supra*, 547 F.2d at 1042-1043.

b. Here, the remarks of the prosecutor were not " 'manifestly intended' " to and were not " 'of such a character that a jury would naturally or necessarily take [them] to be a comment on the failure of the accused to testify.' " *United States* v. *Sorzano*, *supra*, 602 F.2d at 1202; citation omitted. They simply summarized the evidence supporting the government's case and emphasized petitioner's failure to mount a credible defense. Indeed, petitioner's attorney, although objecting to the challenged comments, did not suggest either at trial or before the court of appeals that they were a reference to petitioner's election not to testify. In both instances, petitioner's attorney

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Cir. 1981); *United States* v. *Renfro*, *supra*, 600 F.2d at 57; *United States* v. *Allen*, 588 F.2d 1100, 1108 (5th Cir.), cert. denied, 441 U.S. 965 (1979).

complained that the prosecutor's comments had the effect of shifting the burden of proof to petitioner, and not that they focused attention on petitioner's failure to testify.

At all events, the comments were clearly a proper challenge to the defense attorney to contradict the prosecutor's interpretation of the evidence as he had presented it in his closing argument. See, e.g., *United States* v. *Passaro*, *supra*; *United States* v. *Austin*, *supra*. Each comment, in the form of a question, was addressed by name to the defense attorney. The defense attorney did in fact respond in his closing argument to the challenge presented by the prosecutor's comments, offering his own interpretation of the various items of evidence noted by the prosecutor.

Moreover, when the prosecutor asked the jury what conclusion other than a guilty intent could be drawn from petitioner's failure to deposit cash fees in his bank accounts, his use of undeposited cash receipts for expenditures, and his use of his solely owned corporation to funnel undeposited cash into a partnership of which petitioner was a member, he was doing no more than suggesting what would be an appropriate inference to be drawn from the evidence. Similarly, the prosecutor's suggestion that petitioner's expenditures for acquiring, renovating, and decorating the $350,000 Palm Beach house were for petitioner's personal benefit was a proper statement as to the inference that he thought could be drawn from petitioner's personal involvement with the house. See *United States* v. *Sorzano*, *supra*. As to the comment that the government's evidence on starting point net worth and the amount of petitioner's expenditures was undisputed, that evidence was of such a character that it could have been refuted without the petitioner's testimony. For example, if the government's evidence

concerning bank balances at the starting point was incorrect, it would have been refuted with a bank statement. Moreover, since the government's case was basically documentary and circumstantial, it was possible to dispute the government's version of the facts, as the defense attorney attempted to do, by demonstrating that the documents did not prove what the prosecutor said they did. The comments, therefore, did not constitute indirect comments on petitioner's failure to testify. See *United States* v. *Sorzano*, *supra*.

2. Citing *United States* v. *Massei*, 355 U.S. 595 (1958), and *Holland* v. *United States*, 348 U.S. 121 (1954), petitioner also contends (Pet. 9) that the government failed to carry its burden of proof in establishing a likely taxable source for the alleged unreported income. In particular, petitioner contends that the government failed to negate two possible sources of nontaxable income: (1) an alleged $1.2 million loan that he claims was substantiated by his reporting it to his accountant and his including it on a net worth statement; and (2) alleged "large amounts of cash that were entrusted to petitioner by his clients" (*ibid.*).[10]

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[10] Petitioner claims (Pet. 9) that the unreported judgment of the court of appeals here is in conflict with *United States* v. *Grasso*, 629 F.2d 805 (2d Cir. 1980), and *United States* v. *Bethea*, 537 F.2d 1187 (4th Cir. 1976).

In *Grasso*, the court ruled that the government erroneously failed to examine *available* records to determine possible sources of nontaxable income. 629 F.2d at 808. Here, on the other hand (see pages 12-14, *infra*), the evidence showed an exhaustive search of all available records for documents relating to the alleged loan. Furthermore, petitioner, although afforded the opportunity, supplied no leads that were susceptible of follow-up.

Bethea is likewise distinguishable. There, the court ruled that the government's case was not supported by the evidence

But the government's evidence showed that the likely source of unreported income consisted of undeposited cash proceeds from fees generated in petitioner's practice. Furthermore, the evidence showed that the government conducted a thorough investigation and checked all leads that could be pursued.

In order to establish the offense of tax evasion with the net worth plus expenditures method of proof, the government must establish that (1) the taxpayer had increases in net worth and made expenditures in excess of his reported income, and (2) such excess was derived from a taxable source. *Holland* v. *United States*, *supra*, 348 U.S. at 137; *United States* v. *Dwoskin*, 644 F.2d 418, 422 (5th Cir. 1981); *United States* v. *Grasso*, 629 F.2d 805, 807 (2d Cir. 1980); *United States* v. *Hiett*, 581 F.2d 1199, 1201 (5th Cir. 1978); *United States* v. *Bethea*, 537 F.2d 1187, 1189 (4th Cir. 1976). The taxable source may be established by affirmatively proving a likely taxable source for the excess, *Holland* v. *United States*, *supra*, 348 U.S. at 126, 132-138, or negatively proving the absence of any nontaxable source for the excess, *United States* v. *Massei*, *supra*, 355 U.S. at 595-596.

Here, the government's evidence showed that it had conducted a thorough investigation. *Holland* v. *United States*, *supra*, 348 U.S. at 135-136; *United States* v. *Hiett*, *supra*, 581 F.2d at 1201; *United States* v. *Penosi*, 452 F.2d 217, 220 (5th Cir. 1971). The Internal Revenue agents examined public records for the Florida counties in which taxpayer worked, resided, or owned property and the bank records of all

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(see 537 F.2d at 1189-1192). Here, however, petitioner challenges only the government's failure to prove a likely taxable source.

the banks with which petitioner was known or thought to have done business. See *United States* v. *Normile*, 587 F.2d 784, 786 (5th Cir. 1979); *United States* v. *Penosi*, *supra*, 452 F.2d at 220. Moreover, the agents interviewed petitioner's father, other relatives, and accountant to determine whether he had received funds from nontaxable sources. See *ibid.* The evidence established a likely source, i.e., that petitioner's clients were persons accused of narcotics offenses, that they paid fees in cash, and that portions of the cash receipts were not deposited in his bank accounts. See *United States* v. *Boulet*, 577 F.2d 1165, 1168 (5th Cir. 1978), cert. denied, 439 U.S. 1114 (1979). For example, the evidence disclosed that in one instance petitioner had received a lump sum of $40,000 in cash as a fee, on another occasion had received $100,000 in cash, and indeed that he had bragged of deriving $25,000 per week ($1.3 million per year) from his practice. Thus, there was more than adequate proof of a likely source for the unreported income.

The first lead that petitioner urges should have been investigated more thoroughly, i.e., the alleged $1.2 million loan, was not reasonably susceptible of further corroboration and therefore does not impugn the prosecution's net worth case. *United States* v. *Hiett*, *supra*, 581 F.2d at 1201-1202; *United States* v. *Schafer*, 580 F.2d 774, 779 (5th Cir. 1978); *United States* v. *Boulet*, *supra*, 577 F.2d at 1168, 1171. The only person who had knowledge of the source of the purported loan was petitioner. But petitioner, although he was asked, refused to provide any information concerning the source of the so-called loan (81-5144 Gov't Br. 34 (5th Cir.)). See *United States* v. *Dwoskin*, *supra*, 644 F.2d at 423; *United States* v. *Schafer*, *supra*, 580 F.2d at 783; *United States* v. *Penosi*, *supra*, 452 F.2d at 220. Petitioner's account-

ant had been told only that (1) the principal of the loan was $1.2 million; (2) it was unsecured and did not bear interest; and (3) no repayments had been made. The financial statement prepared to facilitate a business venture listed the purported loan as an account payable. Since the exhaustive investigation showed the loan was not obtained at a third-party financial institution, there was no way of investigating the lead without petitioner's assistance. *United States* v. *Boulet*, *supra*, 577 F.2d at 1168, 1171.

Finally, petitioner's claim that the government failed to determine whether monies were lent or entrusted to him by clients is equally without basis in fact. The record of this case is utterly devoid of any lead to evidence that petitioner's clients actually lent him money, which the government was obliged to follow up. If they had in fact made such loans, both the names of the clients and the supposed amounts were matters that were uniquely within petitioner's knowledge, and his failure to supply such leads is fatal to this claim as well. *Holland* v. *United States*, *supra*, 348 U.S. at 138. Thus, the evidence amply showed a likely source, and the government pursued all reasonable leads.[11]

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[11] We note finally that petitioner did not challenge the government's evidence regarding the likely source of his unreported income in the district court, but challenged only evidence regarding the starting point for the net worth theory of proof (Tr. 986-988). He first raised the likely source issue before the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General
GLENN L. ARCHER, JR.
Assistant Attorney General
ROBERT E. LINDSAY
LIBERO MARINELLI, JR.
Attorneys

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